STATE OF MICHIGAN

COURT OF APPEALS

VIVIAN JOHNSON, MD,

Plaintiff-Appellant,

v

MILLENNIUM TREATMENT SERVICES, L.L.C., DARLENE KAKOS and JUNE ABRAHAM,

Defendants-Appellees.

UNPUBLISHED
May 1, 2007

No. 271705
Oakland Circuit Court
LC No. 2005-066404-CZ

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

In this action involving claims for a violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., a violation of the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., intentional infliction of emotion distress, defamation, and negligence, plaintiff appeals as of right from an order denying her motion for summary disposition under MCR 2.116(C)(9) and granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. Denial of Plaintiff's Motion for Summary Disposition under MCR 2.116(C)(9).

Plaintiff argues that she was entitled to summary disposition under MCR 2.116(C)(9) because defendants failed to state a valid defense to her claims, inasmuch as defendants' June 22, 2005, pleading, entitled "Eighth Affirmative Defense," did not incorporate their previously filed affirmative defenses and superseded the earlier filing.

In *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425-426, 648 NW2d 205 (2002), this Court set forth the applicable standard of review for a motion under MCR 2.116(C)(9):

> This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim. . . . Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly

> untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. [Internal citations omitted.]

The interpretation and application of the court rules is a question of law that is reviewed de novo on appeal. *Colista v Thomas*, 241 Mich App 529, 535; 616 NW2d 249 (2000).

MCR 2.111(F)(3) provides that "[a]ffirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.118(A)(4) provides: "Amendments must be filed in writing, dated, and numbered consecutively, and must comply with MCR 2.113. *Unless otherwise indicated, an amended pleading supersedes the former pleading*." (Emphasis added.)

In this case, defendants filed their answer and affirmative defenses on June 8, 2005, raising seven affirmative defenses. On June 22, 2005, defendants filed another pleading entitled "Eighth Affirmative Defense." The document stated:

> [Defendants] amend their Answer and Affirmative Defenses pursuant to MCR 2.118 to include this Eighth Affirmative Defense:
>
> Eighth: Plaintiff's claims are barred in whole or in part by the exclusive remedy provisions of the Workers Compensation Act, MCL 418.131(1).

This case is distinguishable from *Derderian v Genesys Health Care Systems*, 263 Mich App 364; 689 NW2d 145 (2004), because there was no finding in that case that the amended complaint "otherwise indicated" that it was not superseding the original. Here, it was apparent from defendants' June 22, 2005, pleading that they were merely adding an eighth affirmative defense to be included along with the seven affirmative defenses previously alleged. The trial court did not err in finding that the amended pleading "otherwise indicated" that it did not supersede the original. MCR 2.118(A)(4). Because plaintiff's motion for summary disposition under MCR 2.116(C)(9) was based on the erroneous belief that defendants' original answer and affirmative defenses had been superseded, the trial court did not err in denying plaintiff's motion.

II. Defendants' Motion for Summary Disposition

Plaintiff also argues that the trial court erred in dismissing her various claims under MCR 2.116(C)(10). As this Court explained in *O'Donnell v Garasic*, 259 Mich App 569, 572-573; 676 NW2d 213 (2003):

> A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed in the light most favorable to the party opposing the motion. Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. [Internal citations and quotation marks omitted.]

A. Civil Rights Act

Although plaintiff's complaint alleged claims for race discrimination and unlawful retaliation, plaintiff only challenges the dismissal of her retaliation claim on appeal.

MCL 37.2701(a) prohibits an employer from retaliating against an employee because "the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." A prima facie case of retaliation under the CRA requires proof of the following elements:

> (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Meyer v City of Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).]

Although plaintiff claims that she was subjected to abusive and hostile treatment in her employment, she neither alleged nor presented evidence that the improper conduct was in retaliation for opposing a violation of the CRA or because she made a charge, filed a complaint, or testified, assisted, or participated in an investigation, proceeding, or hearing under the CRA. Instead, she argued below, as she does on appeal, that she was retaliated against for complaining about and reporting alleged violations of drug dispensing laws at Millennium. Even if those allegations were true, however, they do not involve a violation of the CRA. Rather, they involve the WPA. Accordingly, plaintiff failed to establish a genuine issue of material fact regarding the existence of a viable CRA retaliation claim. Thus, the trial court properly dismissed that claim.

B. Whistleblowers' Protection Act

MCL 15.362 provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

The elements necessary to establish a prima facie case of a WPA violation are

> (1) that plaintiff was engaged in protected activities as defined by the act; (2) that plaintiff was subsequently discharged, threatened, or otherwise discriminated against; and (3) that a causal connection existed between the protected activity and the discharge, threat, or discrimination. [*Heckmann v Detroit Chief of Police*,

267 Mich App 480, 491; 705 NW2d 689 (2005) (internal citation and quotation marks omitted).]

In this case, plaintiff alleged that defendants retaliated against her for reporting or threatening to report illegal dispensing of drugs at Millennium. Regardless of whether an actual violation was committed, plaintiff's conduct of reporting or threatening to report suspected violations constituted activity protected under the WPA. See *Roberson v Occupational Health Centers of Americas, Inc*, 220 Mich App 322, 325; 559 NW2d 86 (1996).

Nonetheless, even assuming that plaintiff can show adverse employment actions, the WPA claim was properly dismissed because plaintiff failed to present evidence showing a causal connection between the alleged employment actions and plaintiff's conduct and complaints about methadone dispensing practices at Millennium. The only action that was specifically linked to plaintiff's complaints about drug dispensing was a doctor's conduct in leaving a book on her desk and telling her to drop the methadone dispensing issue. However, the doctor did not make any statement that could be construed as relating to the terms or conditions of plaintiff's employment, nor does plaintiff explain how this incident affected the terms or conditions of her employment. Thus, this isolated incident cannot be considered an adverse employment action sufficient to support a claim under the WPA. Accordingly, the trial court properly dismissed the WPA claim.

C. Intentional Infliction of Emotional Distress

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness; (3) causation, and (4) severe emotional distress." *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004) (internal citation and quotation marks omitted). The conduct "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* (internal citation and quotation marks omitted). "It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Id*. "But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery." *Id*.

The record discloses that plaintiff largely failed to present evidence of extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress. The evidence, for the most part, showed nothing more than "insults, indignities, threats, annoyances, petty oppressions or other trivialities," which are insufficient as a matter of law to be considered extreme and outrageous conduct. *Graham v Ford*, 237 Mich App 670, 674-675; 604 NW2d 713 (1999).[1] The trial court properly dismissed this claim.

[1] Plaintiff's testimony that certain Millennium employees made negative race-based comments to her arguably constituted evidence of extreme and outrageous conduct. However, from the record before us, we do not agree that a reasonable trier of fact could conclude that these comments,
(continued…)

D. Defamation

"A communication is defamatory if, under all of the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or it deters others from associating or dealing with the individual." *Mino v Clio School Dist*, 255 Mich App 60, 72; 661 NW2d 586 (2003) (internal citation and quotation marks omitted).

> In order to establish a claim of defamation, a plaintiff must show: a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm cause by the publication (defamation per quod). [*Id*.]

The element of publication requires only that the statement be published to a third party; a release to the media is not required. *Colista v Thoma*s, 241 Mich App 529, 538; 616 NW2d 249 (2000).

Plaintiff's defamation claim was based on the following allegations:

> 75. Defendants acted with malice and/or reckless disregard for the truth, when they spoke and published untrue words of and concerning Plaintiff to the hearing of diverse persons who had no business or interest in the publication.
>
> 76. Millennium, Darlene Kakos, and June Abraham published several falsehood[s], of and concerning Plaintiff and her office, including false and spurious allegations that Plaintiff "abandoned her patients" and fraudulently "changed her time card to allow for payment."

In support of her claim, plaintiff presented evidence that defendants Kakos and Abraham made unspecified derogatory remarks about plaintiff in front of others. Plaintiff also presented a list of patients who allegedly heard the various statements, but without indicating what actual statements were heard. Without further detail concerning the actual statements made and heard, no conclusion can be made that the statements were defamatory.

(…continued)

standing alone, caused plaintiff severe emotional distress. See *Hayley*, *supra* at 577 (setting forth the elements of a claim for intentional infliction of emotional distress). The dissent states that "the majority finds that the insults complained of by plaintiff amount to nothing more than insults, indignities, threats, annoyances, petty oppressions or other trivialities." However, we are specifically noting that the race-based comments *arguably constituted evidence of extreme and outrageous conduct*. Nevertheless, to establish a claim for intentional infliction of emotional distress, a plaintiff must show that the extreme and outrageous conduct *caused severe emotional distress*. *Id*. We cannot find from the existing record that plaintiff connected the arguably extreme and outrageous conduct (i.e., the race-based comments, standing alone) to her alleged experience of severe emotional distress.

Plaintiff also relied on her deposition testimony describing a conversation with defendant Abraham. Plaintiff explained:

> [Abraham] said that I shouldn't be paid for time that I had submitted when I was working someplace else. She said that to me, she said that to patients, within patient earshot, and she questioned my professionalism. She said, any doctor worth their salt and that was a true professional would not be submitting payments to their employer for work that they didn't do for periods that weren't covered. And she said, If you think about it, this is just like somebody trying to run a fraud on someone. And I said, How dare you attack me when you don't even know my circumstances. I've never spoken to your professionalism, nor have I accused you of any behaviors. If you did something, I reported only what you did, without any emotion. But when you attack my professionalism and you start accusing me of dishonesty, I can't take that.

Not all defamatory statements are actionable. *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). "If a statement cannot be interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment." *Id.* Although not all statements of opinion are protected, a statement must be "provable as false" to be actionable. *Id.* at 616 (internal citation and quotation marks omitted). In *Ireland*, the Court explained:

> By way of example, . . . the statement "In my opinion Mayor Jones is a liar" would be potentially actionable, while the statement "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" would not be actionable. . . . [A]pparently . . . these examples . . . illustrate the difference between an objectively verifiable event, such as lying, and a subjective assertion like "shows his abysmal ignorance . . . ." [*Id.* at 616 (internal citations and quotation marks omitted)]

Defendants submitted evidence that plaintiff had been working at Biomed Behavioral Services on days she took vacation and sick days at Millennium, and plaintiff failed to rebut that evidence. Viewed in context, plaintiff's deposition testimony establishes a disagreement between herself and Abraham in which Abraham expressed her opinion that it was unprofessional to accept payments from one employer while working someplace else. Under the circumstances, such an expression of opinion is not actionable.

For these reasons, the trial court properly dismissed the defamation claim.

E. Negligence

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004).

On appeal, plaintiff asserts that she had a viable negligence claim against Millennium based on its "negligent hiring, training, and retention of Abraham and Kakos," and further asserts that "Millennium knew or should have known of the wrongful acts against [her]," but she does

not otherwise develop her argument and also fails to identify any evidence factually supporting her claim. An appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claim. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

In any event, to the extent that this claim is based on the alleged harassment, discrimination, or retaliation faced by plaintiff in the workplace, plaintiff cannot establish an independent claim for negligence because the CRA and WPA provide the exclusive remedy for such conduct. See, e.g., *McClements v Ford Motor Co*, 473 Mich 373, 382-383; 70 NW2d 166, amended 474 Mich 1201 (2005), and *Driver v Hanley*, 207 Mich App 13, 18; 523 NW2d 815 (1994). Furthermore, to the extent that plaintiff relies on her allegations of defamatory conduct and intentional infliction of emotion distress by Millennium's employees to support a claim for negligence against Millennium, in light of our conclusion that the evidence does not support claims for defamation or intentional infliction of emotional distress, the negligence claim was properly dismissed.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Patrick M. Meter